Kum Wah Sdn Bhd v RHB Bank Bhd (formerly known as Malayan Banking Corp Bhd) (United Frank Sdn Bhd & Ors, third parties)

HIGH COURT (KUALA LUMPUR)
NOOR AZIAN J
6 JULY 2009

Banking — Banker and customer — Duty of banker — Forgery — Debits in applications for cashier's order — Whether applications made by plaintiff — Whether plaintiff discharged onus in proving signatures on applications were not those of its signatories — Whether defendant bank negligent in its duty to customer — Whether third parties liable to defendant if latter held liable to plaintiff

Evidence — Expert evidence — Handwriting expert — Whether gazetted document examiner more qualified to give evidence

The plaintiff was a family company that was involved as wholesaler, dealer and retailer of wine and liquor. The three directors of the plaintiff company were all brothers. The plaintiff opened its current account in the form of an overdraft facility ('the plaintiff's account') with United Malayan Banking Corporate Bhd, which through a series of mergers became to be known as the RHB Bank Bhd, the defendant. The signatories to the plaintiff's account were the three directors, although the plaintiff asserted that for the banking facility it only used a rubber stamp bearing the plaintiff company's name. On 19 June 2001, the plaintiff's account was debited by RM848,806.45, which was made up as follows: RM6,302.15 in favour of EON Finance; RM374,402.15 in favour of Tan Keng Pan @ Thiam Hock; and RM468,502.15 in favour of United Frank Sdn Bhd. Of these, although the first debit of RM6,302.15 was debited from the plaintiff's account it was never paid out to EON Finance Bhd. The second sum of RM374,402.15 in favour of Tan Keng Pan @ Thiam Hock was allowed to be banked into their joint account ie Tan Keng Pan and/or Ho Thiam Hock. All the three debits were in the form of applications for cashier's order. The plaintiff argued that its account with the defendant bank was wrongfully debited by the sum of RM848,806.45. It then filed the present suit against the defendant for breach of mandate and/or negligence resulting in the wrongful debit of RM848,806.45 from its account. By this action the plaintiff sought a declaration that the debit was unlawful and without authority and that therefore the sum of RM848,806.45 ought to be paid by the defendant to the plaintiff. The defendant in turn filed a third party proceedings against United Frank Sdn Bhd, Tan Keng Pan and Ho Thiam Hock and claimed the sums of RM468,500 from United Frank Sdn Bhd and RM374,000 from the other two

parties. The defendant claimed that it was entitled to be compensated by the third parties in respect of any damages and loss that it may have to pay in the event that it was held liable for the wrongful debits from the plaintiff's account. The defendant submitted that it was entitled to claim for damages against the third parties for payments made under a mistake under s 73 of the Contracts Act 1950 and/or alternatively under the principles of monies had and received. There was no representation by the first third party ie United Frank Sdn Bhd but the court was informed that it was wound up. Tan Keng Pan and Ho Thiam Hock confirmed that they did not have any dealings with the directors of the plaintiff company. Ho Thiam Hock, who was in charge of daily operations of Sri Saran Daya Sdn Bhd, a money changer company, submitted that the payment of RM374,000 was for a bona fide valuable consideration ie in giving foreign currencies to an unknown person. Both the plaintiff and the defendant called their own handwriting experts as expert witnesses to verify whether the signatures that appeared on the three cashier's order applications were those of the signatories to the plaintiff's account. The issues to be tried were whether the three cashier's order applications for the amount claimed were made by the plaintiff and whether the third parties were liable to the defendant in the event the latter was held liable to the plaintiff for the amount debited from the plaintiff's account.

Held, allowing the plaintiff's claim with costs:

(1) The three directors of the plaintiff appeared from their demeanour to be honest witnesses. As such there was no reason to doubt their evidence that they had not given the defendant bank the mandate to issue the three cashier's orders (see para 20).

(2) The expert witness that the plaintiff called upon to give evidence at the trial was more qualified to give evidence in respect of whether the signatures on the three cashier's order applications were forgeries because he is a document examiner. This witness was convincing in concluding that the signatures on the three cashier's order applications were not those of the plaintiff. As such, the plaintiff had discharged its onus of proof as required under s 101 of the Evidence Act 1950 in establishing that the three signatures were not those of its signatories. Further, on the balance of probabilities the documents did not have the mandate of the plaintiff with reference to the rubber stamp (see para 20).

(3) Although the defendant bank had a duty to call its customers to verify or check in respect of cashier's order applications above RM20,000 it would appear that the defendant had not done so. The fact that the defendant allowed the cashier's order for RM374,000 issued in the name Tan Keng Pan @ Thiam Hock to be banked into a joint account bearing the names Tan Keng Pan and/or Ho Thiam Hock is another piece of evidence that would support the defendant's negligence (see paras 21–23).

(4) Tan Keng Pan and Ho Thiam Hock acted in good faith and there was no mistake when they were paid for exchange of currencies. It was an unknown person who had gained by the defendant's mistake. Thus s 73 of the 1950 Act would not apply in this case and the third parties were not liable to the defendant (see paras 33–34).

[Bahasa Malaysia summary

Plaintif merupakan syarikat keluarga yang terlibat sebagai pemborong, pengedar dan peruncit wain dan arak. Ketiga-tiga pengarah plaintif syarikat merupakan adik-beradik. Plaintif membuka akaun semasanya dalam bentuk kemudahan overdraf ('akaun plaintif') dengan United Malayan Banking Corporate Bhd, yang mana berikutan dengan beberapa siri penggabungan, kini dikenali sebagai RHB Bank Bhd, defendan. Penandatangan akaun plaintif adalah ketiga-tiga pengarah tersebut, walaupun plaintif menegaskan bahawa bagi tujuan kemudahan perbankan, plaintif hanya menggunakan cap getah nama syarikat plaintif. Pada 19 Jun 2001, akaun plaintif didebitkan sebanyak RM848,806.45, yang mana pecahannya adalah seperti berikut: RM6,302.15 untuk EON Finance; RM374,402.15 untuk Tan Keng Pan @ Thiam Hock; dan RM468,502.15 untuk United Frank Sdn Bhd. Daripada kesemua ini, walaupun jumlah pertama sebanyak RM6,302.15 telah didebitkan daripada akaun plaintif tetapi jumlah tersebut tidak pernah dibayar kepada EON Finance Bhd. Jumlah kedua RM374,402.15 untuk Tan Keng Pan @ Thiam Hock dibenarkan dimasukkan ke akaun bersama iaitu Tan Keng Pan dan/atau Ho Thiam Hock. Ketiga-tiga debit ini dalam bentuk permohonan untuk perintah juruwang. Plaintif berhujah bahawa akaunnya dengan bank defendan telah salah didebitkan dengan jumlah RM848,806.45. Plaintif kemudiannya memfailkan tindakan ini terhadap defendan atas kemungkiran mandat dan/atau kecuaian kerana debit salah sejumlah RM848,806.45 daripada akaunnya. Menerusi tindakan ini, plaintif memohon pengisytiharan bahawa debit tersebut adalah menyalahi undang-undang dan tanpa kebenaran dan jumlah RM848,806.45 harus dibayar kepada plaintif oleh defendan. Defendan pula memfailkan prosiding pihak ketiga terhadap United Frank Sdn Bhd, Tan Keng Pan dan Ho Thiam Hock dan menuntut sejumlah RM468,500 daripada United Frank Sdn Bhd dan RM374,000 daripada dua pihak yang lain tersebut. Defendan menyatakan bahawa defendan berhak dipampas oleh pihak-pihak ketiga atas sebarang kerugian dan pampasan yang defendan mungkin kena bayar jika defendan didapati bertanggungan atas salah debit daripada akaun plaintif. Defendan berhujah bahawa defendan berhak untuk menuntut ganti rugi terhadap pihak-pihak ketiga untuk bayaran yang telah dibuat atas kesilapan di bawah s 73 Akta Kontrak 1950 dan/atau secara alternatif di bawah prinsip-prinsip wang yang ada dan telah diterima. Tiada perwakilan bagi pihak ketiga yang pertama iaitu United Frank Sdn Bhd tetapi mahkamah dimaklumkan bahawa United Frank telah digulung. Tan Keng Pan dan Ho Thiam Hock mengesahkan bahawa mereka tiada urusan dengan pemgarah-pengarah plaintif syarikat. Ho Thiam Hock, yang

bertanggungjawab atas urusan harian Sri Saran Daya Sdn Bhd, sebuah syarikat penggurup wang, menyatakan bahawa bayaran sebanyak RM374,000 adalah untuk balasan bernilai bona fide iaitu memberikan wang asing kepada orang yang tidak dikenali. Kedua-dua plaintif dan defendan memanggil pakar tulisan masing-masing sebagai saksi pakar untuk mengesahkan sama ada tandatangan-tandatangan yang tertera di atas ketiga-tiga permohonan perintah juruwang merupakan penandatangan akaun plaintif. Isu-isu yang perlu diputuskan ialah sama ada ketiga-tiga permohonan perintah juruwang bagi jumlah yang dituntut dibuat oleh plaintif dan sama ada pihak-pihak ketiga bertanggungan terhadap defendan jika defendan diputuskan bertanggungan terhadap plaintif untuk jumlah yang didebitkan daripada akaun plaintif.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Melihat kepada tingkah laku ketiga-tiga pengarah plaintif menunjukkan bahawa mereka saksi yang jujur. Oleh itu, tiada alasan untuk meragui keterangan mereka bahawa mereka tidak memberikan mandat kepada defendan bank untuk mengeluarkan tiga perintah juruwang (lihat perenggan 20).

(2) Saksi pakar yang dipanggil plaintif memberi keterangan di perbicaraan lebih berkelayakan untuk memberikan keterangan sama ada tandatangan-tandatangan pada ketiga-tiga permohonan perintah juruwang adalah palsu oleh sebab dia merupakan pemeriksa dokumen. Saksi ini amat meyakinkan apabila menyimpulkan bahawa tandatangan-tandatangan pada ketiga-tiga permohonan perintah juruwang bukanlah milik plaintif. Oleh itu, plaintif berjaya membuktikan atas beban pembuktian seperti yang dikehendaki di bawah s 101 Akta Keterangan 1950 dalam mengesahkan bahawa ketiga-tiga tandatangan tersebut bukanlah milik penandatangan plaintif. Selanjutnya, atas imbangan kebarangkalian, dokumen-dokumen tersebut tidak mendapat mandat daripada plaintif dengan merujuk kepada cap getah tersebut (lihat perenggan 20).

(3) Walaupun defendan bank bertanggungjawab menghubungi pelanggan-pelanggannya untuk mengesah atau memeriksa permohonan-permohonan perintah juruwang yang berjumlah RM20,000 ke atas, tetapi defendan tidak berbuat demikian. Fakta bahawa defendan membenarkan perintah juruwang untuk sejumlah RM374,000 atas nama Tan Keng Pan @ Thiam Hock dimasukkan ke dalam akaun bersama atas nama Tan Keng Pan dan/atau Ho Thiam Hock merupakan satu lagi bukti kecuaian defendan (lihat perenggan 21–23).

(4) Tan Keng Pan dan Ho Thiam Hock betindak secara suci hati dan tiada kesilapan apabila mereka dibayar untuk penukaran wang asing. Adalah tidak diketahui siapakah yang mendapat keuntungan atas kesilapan

defendan. Maka s 73 Akta 1950 tidak terpakai atas kes ini dan pihak-pihak ketiga tidak bertanggungan terhadap defendan (lihat perenggan 33–34).] A

Notes

For cases on duty of banker, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1818–1824. B

For cases on handwriting expert, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1465–1473.

Cases referred to C

Bank Bumiputra Malaysia Bhd v Hasbudin Haslin [1998] 2 CLJ Supp 332, CA (refd)

Barclay's Bank Ltd v WJ Simms & Cooke (Southern) Ltd [1980] 1 QB 677, QBD (folld) D

Legislation referred to

Contracts Act 1950 s 73

Evidence Act 1950 s 101

David Hoh (Kingston Tan and HQ Kwong with him) (Heiley Hassan, Tan & Partners) for the plaintiff. E

Kumar Kanagasingam (Suhaiza Zakaria with him) (Lee Hishamuddin Allen & Gledhill) for the defendant.

NS Guok (SK Thong with him) (Thong Seng Kong & Assoc) for the third parties. F

Noor Azian J:

[1] On 19 June 2001, the plaintiff's (Kum Wah Sdn Bhd) account with the defendant, RHB Bank Bhd (formerly known as United Malayan Banking Corp Bhd) was debited by the sum of RM848,806.45 which the plaintiff alleged was wrongfully done by the defendant. G

[2] The plaintiff then filed this suit against the defendant for breach of mandate and/or negligence resulting in the wrongful and unilateral debit from the plaintiff's account with the defendant of the sum of RM848,806.45. H

[3] The plaintiff prayed for a declaration that the debit of the said sum from the plaintiff's account was unlawful and without authority and that the said sum be paid by the defendant to the plaintiff. I

[4] The defendant filed third party proceedings against United Frank Sdn Bhd ('FTP') and Tan Kang Pan ('STP') and Ho Thiam Hock ('TTP').

[5] In respect of the third party proceedings, the defendant claimed that it had made payments to FTP, STP and TTP in the following amounts:

(1)	FTP —	RM468,500; and
(2)	STP/TTP —	RM374,000.

[6] The defendant claims that it is entitled to be compensated by the STP and TTP in respect if any damages and loss that it may have to pay in the event the defendant is held responsible to the plaintiff for the amount the plaintiff claimed was wrongfully paid by the defendant to the STP and TTP under s 73 of the Contracts Act 1950 or amount that was had and received by both the STP and the TTP.

[7] For the trial the plaintiff called five witnesses, they being:

(1)	PW1	— Tai Lai Kee. Former bank manager of RHB Bank, Pudu branch.
(2)	PW2	— Look See Kuan. One of the three directors of the plaintiff.
(3)	PW3	— Look See Kee. One of the three directors of the plaintiff.
(4)	PW4	— Bala Shanmugam a/l M Vadivelu. Forensic document examiner.
(5)	PW5	— Look Kan Chai. One of the three directors of the plaintiff.

[8] The defendant called six witnesses:

(1)	DW1	— Aziz bin Abdullah. Assistant superintendent of police.
(2)	DW2	— Goh Sing Min. Defendant's branch manager
(3)	DW3	— Leong Fang Lang. Head cashier with the defendant.
(4)	DW4	— Aw Peng Onn. Defendant's manager.
(5)	DW5	— Mohd Azmi Mohd Yusoff. At one time an assistant bank manager of the defendant.
(6)	DW6	— Harcharan Singh Tara. Chemico-Legal and Forensic consultant.

[9] The third parties called one witness:

(1)	TPW1	— Ho Thiam Hock in charge of daily operations of Sri Saran Daya Sdn Bhd, a money changer company. Gave foreign currencies to unknown person who had banked in the RM374,000 into the RHB bank account No 2–14213–9000292–7.

[10] The brief facts of the case is that the plaintiff was established since 21 June 1978 as a family company involved as wholesaler, dealer and retailer of wine and liquor.

[11] There are three directors of the plaintiff's company ie PW2, PW3 and PW5 and they are all siblings being 66 years old, 72 years old and 65 years old respectively.

[12] On 19 June 2001 the plaintiff's account was debited for the following sums:

(1)	RM6,302.15	— In favour of EON Finance Bhd;
(2)	RM374,402.15	— In favour of Tan Kang Pan @ Ho Thiam Hock; and
(3)	RM468.502.15	— In favour of United Frank Sdn Bhd.

[13] Although the RM6,302.15 was debited from the plaintiff's account with the defendant, the defendant never actually paid out this amount to EON Finance Bhd.

[14] The TTP confirmed that they did not have any dealings with the plaintiff nor with the directors, PW2, PW3 and PW5.

[15] The plaintiff opened its current account in the form of overdraft facility with the defendant (then known as United Malayan Banking Corp Bhd which through a series of mergers became to be known now as RHB Bank Bhd) since 12 November 1979 ie 22 years prior to the relevant date. Initially, the plaintiff's account was at the defendant's Pudu branch (located in Sg Besi) where upon merger with the defendant's Jalan Pasar branch in May 2001, the plaintiff's account was transferred to the Jalan Pasar branch.

[16] Originally the plaintiff's overdraft facility was RM700,000 but in 1979 it was increased to 1.5m vide the defendant's letter of offer of 26 December 2000 — exh 'P3'. The overdraft was for a working capital.

[17] The signatories to the plaintiff's account were three ie PW2, PW3 and PW5 as well as the plaintiff's rubber stamp. The plaintiff asserted that for the banking facility it only used the rubber stamp as in exh 'P18(a)'.

[18] After a trial of 29 days, four days before the first trial judge, one day before the second trial judge and 24 days before myself and notes of evidence totaling 269 pp, I allowed the plaintiff's claim with cost and ordered the defendant to refund the amount debited with interest from the date the

amount was debited ie 19 June 2001 until 19 November 2007. The defendant's claim against the STP and TTP was dismissed with cost.

[19] The *issue before the court is a question of fact* ie whether the applications for the cashier's order for the amount claimed were made by the plaintiff. The relevant application forms for this case are marked as exhs 'D4', 'D5' and 'D6'.

[20] In considering the plaintiff's claim for breach of mandate and/or negligence resulting in the wrongful and unilateral debit from the plaintiff's account with the defendant of the sum of RM848,806.45, the following were considered:

(a) *No mandate given by the plaintiff for issuance of exhs 'D4', 'D5' and 'D6'*

(1) Direct evidence of PW2 and PW3 denying giving mandate

I have no reason to doubt the evidence of PW2, PW3 and PW5 who at such ripe ages of 66 years, 72 years and 65 years are running a family business. Observing their demeanor they appear simple people and I agree that they bear out as honest witnesses.

(2) Signature of PW2 and PW3 as found in exhs 'D4', 'D5' and 'D6' are forgeries

Both parties called their own expert witnesses and it was their evidence that took up most of the trial time. That was why the trial took so long.

Bala Shanmugam (PW4) was the expert witness for the plaintiff and Harcharan Singh Tara (DW6) was the expert witness for the defendant.

Based on their qualifications and experiences, I am more inclined to accept that PW4 is more qualified to give evidence in respect of whether the signatures on exhs 'D4'; 'D5' and 'D6' are forgery. DW6 may have been the director general of the Malaysian Chemistry Department but he was never gazetted as a document examiner in the government service. He said ' *I am not a gazetted document examiner. I have never produced a technical report. Yes, a technical report can only be produced by a gazetted document examiner*.'. As such I am of the considered opinion that PW4 is more qualified and experienced to give testimony in respect of signatures on the three documents mentioned.

From the elaborate evidence adduced through PW4 and the extensive cross-examination of the same witness by the defendant's counsel, I am satisfied on the balanced of probabilities that the two signatures on all the three exhibits are not those of PW2 and PW3.

I will not elaborate in detail but suffice if I were to say that the plaintiff's expert witness (PW4) was able to convince me that the signatures on the three documents are not that of the plaintiff's.

The plaintiff had discharged their onus of proof as required by s 101 of the Evidence Act 1950 in establishing that the signatures on the three documents are not those of the signatories to the plaintiff's account with the defendant.

(3) Plaintiff's forged rubber stamp

I totally agree that there is a difference in the rubber stamp used on the three documents. PW2 and PW3 had described the discrepancy in the rubber stamp, they used for banking facility and the one used on the documents ie ' *No:*' (with colon) as opposed to ' *No.*' (with full stop).

On the balance of probabilities also, I am satisfied that the documents did not have the mandate of the plaintiff with reference to the rubber stamp.

(b) Negligence by the defendant

[21] From the testimonies of the defendant's witnesses, the defendant had a duty to call its customers to verify/check in respect of applications for cashiers orders exceeding RM20,000. DW2 gave evidence to this effect.

[22] Here again, considering the witnesses, PW2, PW3 and PW5, the simple old brothers who ran the family business I am more inclined to believe them ie they did not receive any phone calls from anybody from the defendant to check/verify if the plaintiff had applied for the cashier's order.

[23] Another piece of evidence that would support the sheer negligence of the defendant is that the cashier's order for RM374,000 issued in the names of STP @ TTP (Tan Kang Pan @ Ho Thiam Hock) was allowed to be banked into their joint account (Tan Kang Pan and/or Ho Thiam Hock). This demonstrates the extreme carelessness on the part of the defendant. Judicial notice can be taken that in banking procedure, @ is an account of one person identified by more than one name whilst joint account is an account of more than one person.

[24] I am therefore of the considered opinion, based on the aforesaid reasons that the application for the cashier's order were never made by the plaintiff. The plaintiff's claim against the defendant was therefore allowed with cost.

[25] In respect of the *third party proceedings*, only the STP and the TTP were represented.

[26] The defendant alleged that as a result of payment to the STP and the TTP without mandate of the plaintiff and/or under a mandate, the defendant

is entitled to recover damages against the STP and the TTP under s 73 of the Contracts Act 1950 and/or alternatively under the principles of monies had and received.

[27] The defence of the STP and TTP is essentially that the payment of RM374,000 on 19 June 2001 into their joint account held by them was for a bona fide valuable consideration ie in consideration that Sri Saran Daya Sdn Bhd (a company operating a money changer business) changing a sum of USD30,000, Pound Sterling 30,000, Hong Kong Dollar 200,000 to a person not known to both the STP and the TTP.

[28] The agreed issues to be tried between the parties are as follows:

(a) whether the STP and TTP are liable to pay the defendant for the judgment sum in the event the defendant is held liable to the plaintiff;

(b) if the defendant is liable to pay the plaintiff, whether the defendant had made a mistake in making the payment to the STP and TTP as pleaded; and

(c) whether the defendant is entitled to claim for damages against the STP and TTP for payment under mistake under s 73 of the Contracts Act 1950 and/or alternatively under monies had and received.

[29] The relevant evidence adduced in respect of the third party proceedings were:

(a) Three applications for cashier's order exhs 'D4', 'D5' and 'D6' was for the following:

(i) RM468,500 — For United Frank Sdn Bhd; 'D4'.

(ii) RM374,000 — For Tan Kang Pan @ Ho Thiam Hock; 'D5'.

(iii) RM6,300 — For EON Finance Bhd; 'D6'.

(b) In respect of the cashier's order for RM374,000 it was banked in into the *joint* account of the STP and TTP in spite of the cashier's order bearing their names as *alias*.

(c) The money was banked in as payment for various foreign currencies mentioned earlier.

(d) The TTP had given the currency to a person who came to the premises of the TTP's company.

[30] I have no doubt about the evidence given by TPW1. However I would like to state again that the defendant's branch that accepted the cashier's order

for the sum of RM374,000 was definitely careless in allowing a cheque bearing the names of the STP and TTP as alias to be banked in into their joint account.

[31] The STP and TTP into whose account the cashier's order was banked in gave valuable consideration.

[32] It was in fact the defendant who was negligent in not verifying the three application forms and subsequently allowing the cashier's order for RM374,000 to be banked in into the joint account of the STP and the TTP. If the bank staff had been vigilant and careful and noticed the discrepancy, it would ring a bell and the cashier's order would be stopped.

[33] Section 73 of the Contracts Act 1950 is in respect of the liability of a person to whom money is paid, or thing delivered, by mistake or under coercion. In the case as for the STP and TTP there was no mistake, they were paid for exchange of currencies. They acted in good faith. It was unknown person who had gained by the defendant's mistake. In the case of *Bank Bumiputra Malaysia Bhd v Hasbudin Haslin* [1998] 2 CLJ Supp 332, the case of *Barclay's Bank Ltd v WJ Simms & Cooke (Southern) Ltd* [1980] 1 QB 677 was referred to where Geoff J said:

> It follows that the payee has given consideration; with the consequence that although the payment has been caused by the bank's mistake, the money is irrecoverable from the payee unless the transaction of payment is itself set aside.

[34] Based on the aforesaid, I find that the STP and TTP is not liable to the defendant who is found liable for the plaintiff's losses. Therefore, the defendant's counterclaim against STP and TTP is dismissed with costs.

[35] With respect to the FTP, the court was informed that it was wound up (exh 'P25'). Since there was no representation for the FTP and the defendant did not ask for any order, I would strike out the claim against the FTP.

Plaintiff's claim allowed with costs.

Reported by Kohila Nesan